

No. 71011-7

**IN THE COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION I**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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C. COOK

Appellant

v

ADVANCED AUTO BROKERS, LLC
dba CARMAX BROKERS

Respondents

APPELLANT'S BRIEF

C. Cook
14912 Northpark Ave N
Seattle, WA 98133

Appellant, *pro se*

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I. INTRODUCTION

This is a breach of contract and tort action asserting that Advanced Auto Brokers, LLC dba CarMax Brokers (“Defendant”) significantly misrepresented the condition of a 2007 Jeep Grand Cherokee which Plaintiff had purchased from Defendant.

In March of 2012 Plaintiff purchased a vehicle (VIN# 1J8GR48K07C645301) on the eBay auction site, where it was offered by seller “carmaxbrokers”. (Plaintiff would find later that they have no connection with the CarMax national franchise) Plaintiff flew to Philadelphia and examined the car to the best of his ability, and completed the purchase, and then began the drive home to Seattle. After twenty minutes on the road the vehicle manifested serious problems. (Complaint, ¶¶ 2.2 - 2.3, CP p. 3) Over the next six months Plaintiff made numerous and repeated attempts to resolve this with Yuri Konfederat, the owner of CarMax Brokers, to no avail. (Complaint, ¶¶ 2.4 & 3.2, CP p. 4) Plaintiff is unable to register the vehicle with the State and license it, owing to the emissions faults and other problems.

II. ASSIGNMENTS OF ERROR

A. It was error for the trial court to deny Plaintiff's Motion for Default Judgment

The Summons and Complaint in this matter was served in person on an officer of Defendant, by the Sheriff of Philadelphia and attested on December 29, 2012. Thus notice of this action was properly made on Defendant under RCW 4.28.180, which provides, *“The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state.”*

Defendants failed to appear or respond within the requisite 60 days, a fact noted by the trial court on July 2, 2013 (Order on “Motion to Deem Admitted”, ¶ 1 item (2), CP p. 33)(Order on Second Motion to Deem Admitted, ¶ 3, CP p. 47), almost 7 months after this action was filed. In response to Plaintiff's Motion for Default, the trial court denied on the grounds that there may be an issue of personal jurisdiction (Order Denying Motion for Default, CP p. 20), although this hadn't been formally raised by Defendant

and such a position appears to be in conflict with recent case law.

As Defendants failed to respond to the trial court's repeated admonitions to appear for almost 9 months, and as RCW 4.28.185 and recent case law supports Plaintiff's assertion of jurisdiction, Defendants were in fact in default, and repeatedly disregarded and rejected the trial court's multiple attempts to advise them. And a finding of default should have been made by the trial court if the interests of the parties are to be balanced.

***B. It was error for the trial court to deny Plaintiff's
Motion to Deem Admitted and Second Motion to
Deem Admitted***

CR 36(a) states, "*Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney*"... The trial court in this case gave Defendants three extensions, totaling 4 months, for Defendants to

respond to Plaintiff's Request for Admissions, and Defendants have in fact never responded to such discovery. Is it balancing the interests of the parties to grant effectively indefinite extensions for discovery?

Such extensions and denial of Plaintiff's Motions to Deem Admitted have unfairly prejudiced Plaintiff's case, leading to its dismissal through Defendant's recalcitrance to discovery. Motions to deem admitted are commonly granted when requests for admissions are ignored, and this is the mechanism to ensure that discovery can be made. It was fatal to Plaintiff's case that the trial court denied his Motions.

C. It was error for the trial court to deny Plaintiff's Motion for Relief for Corporate Party's Failure to Attend Deposition and for Costs

Plaintiff had properly noticed Defendant of his CR 30(b)(6) deposition (Motion for Relief for Corporate Party's Failure to Attend Deposition, Exhibit A, CP p.) but Defendant made no attempt to contact Plaintiff regarding such deposition, and failed to attend on the appointed date and time. When the noticed party fails to attend

CMRRR submitted as ex A, but not recorded for unknown reasons. Evidence also submitted to Judge's working paper.

it is common for the court to admonish or sanction the offending party in some manner, to include rescheduling, striking pleadings, and charging the unresponsive party costs which were incurred by the noticing party.

In the instant case Plaintiff filed a Motion for Relief requesting such remedies (CP p. 43), however the trial court denied such motion granting Defendant another extension. (CP p. 46) When there are no sanctions for bad conduct, it can not but encourage such conduct. This denial of Plaintiff's Motion has had the effect of allowing Defendant to disregard discovery with impunity, and has thus unfairly prejudiced Plaintiff's case.

***D. It was error for the trial court to grant
Defendant's Motion to Dismiss***

Washington Civil Rule 12 sets out the deadlines for answering or filing a motion to dismiss, as well as the consequences for not timely raising the personal jurisdiction defense. Plaintiff's action was irreparably damaged when the trial court granted effectively indefinite extensions to a recalcitrant defendant, until they finally responded almost nine months after this

case was filed. And only then, when the trial court had made very clear that it would favor their motion for dismissal. The trial court appeared to solely favor the interests of Defendant, to the complete exclusion of Plaintiff's interests and efforts in this matter, and erred in granting such favoritism to a clearly uncooperative defendant, and a defendant with unclean hands.

As the trial court gives no explanation for its reasoning in granting Defendant's Motion to Dismiss, Plaintiff can only speculate as to the weight given such aspects as the relevance of *Boschetto v. Hansing*, the impact of Defendant's practically exclusive use of e-Bay as sales channel and its relation to Washington's 'long arm statute' and recent case law, as well as Defendant's apparently improper use of the trademarked CarMax name, and other case law cited by Plaintiff to demonstrate that the trial court has personal jurisdiction over Defendant. Plaintiff is perplexed with the apparent preference the trial court seems to have shown throughout this case for a disrespectful and willfully unresponsive defendant, over a plaintiff demonstrably wronged.

But it does seem clear that the trial court ruled incorrectly at several critical junctures of this case, and in direct contravention to

timely noted statute and case law applicable to the issues at hand, ultimately and inexplicably destroying Plaintiff's rightful claim. The trial court erred in overruling RCW 4.28.185, as well as established case law supporting and clarifying it including *Davis v. Opacki*, *Brown v. Garrett*, *Precision Laboratory Plastics v. Micro Test, Inc.*, *Dedvukaj v. Maloney*, *Erwin v. Piscitello*, and *Aero Toy Store, LLC v. Grieves*. (Plaintiff's Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶ 2.4 – 2.7, CP p. 70-71)

III. STATEMENT OF FACTS AND OF THE CASE

A. First Action – Small Claims

Plaintiff filed suit in King County District Court (Shoreline, WA) on September 17, 2012. On the day of the trial, Plaintiff learned that Defendant had responded to the court by email (without noticing Plaintiff), requesting that the court dismiss the case for lack of personal jurisdiction. Plaintiff was not allowed to offer any testimony or evidence and the case was dismissed.

B. Second Action – Superior Court

1. Motion for Default

Plaintiff then filed suit in King County Superior Court on December 14, 2012, requesting economic damages of \$10,900, pre- and post-judgment interest, court costs, attorney fees, and treble damages under RCW 19.86.020 and RCW 19.86.090. Defendant was personally served notice by the Sheriff of Philadelphia on December 29, 2012. (Motion and Affidavit for Order of Default, Exhibit A, CP p. 13) On January 24, 2013 a “Motion to Dismiss” was filed but not duly set, composed by Yuri Konfederat; Mr. Konfederat is not a party to the case nor an attorney licensed in Pennsylvania, Washington, or another state. Mr. Konfederat also failed to notice Plaintiff in any manner of this “Motion”. On March 9, 2013 Plaintiff filed his Motion and Affidavit for Order of Default (CP p. 6), requesting a finding that Defendant has failed to file a responsive pleading timely, and so there is no matter of fact or the law at issue remaining in this cause.

On April 23, 2013 Plaintiff received in the mail, Judge Downing's Order Denying Motion for Default. (CP p. 20) Plaintiff's

Motion for Default was denied as, although the trial court hadn't accepted for consideration Mr. Konfederat's "Motion to Dismiss", it did accept its contention that there may be lack of personal jurisdiction and this was the reasoning for denying Plaintiff's Motion for Default.

2. Request for Admissions

On May 3, 2013 Plaintiff filed his Request for Admissions Directed to Defendant (CP p. 22) and properly served them on Defendant, who still at this time had not hired Washington counsel.

This Request was received by Defendant on May 9, 2013. (Motion to Deem Admitted, Exhibit A, CP p. 7) *Not recorded for unknown reasons, but supplied in Judge's working papers*

By June 14, 2013 no response was received from Defendant to Plaintiff's Request for Admissions, so Plaintiff filed his Motion to Deem Admitted (CP p. 13) and properly served it on Defendant. In this, Plaintiff requested of the trial court that Requests for Admissions 1 through 19 be deemed admitted in full and conclusively, in accord with CR (36)a. Plaintiff also referred the trial court to case law on requests for admissions in sections 6:13 et seq, supra of Washington Motions in Limine.

On July 2, 2013 Plaintiff received the trial court's Order on "Motion to Deem Admitted". (CP p. 33) In it the trial court noted that Defendant had not yet appeared through counsel in this cause and "*it is ultimately necessary that this be done*". (Order on "Motion to Deem Admitted", ¶ 1 item (2), CP p. 33) And the trial court noted that Defendant had "*previously opposed plaintiff's motion for default by raising an issue of personal jurisdiction,*" effectively suggesting that a properly set motion be made. With this, the trial court gave Defendant a further 30 days to file a motion asserting lack of personal jurisdiction through Washington counsel. For good measure the trial court mailed this Order to both known addresses of Defendant (Order on "Motion to Deem Admitted", ¶ 2(d), CP p. 34), and to Plaintiff.

On July 8, 2013 Plaintiff filed his Notice for Deposition and Demand for Designation of Representative Deponent (CP p. 35), scheduling a deposition for July 30, 2013 at 9:00am.

3. Settlement Request

On July 16, 2013 Plaintiff received a phone call from Mr Konfederat asking what would be needed to settle this. Plaintiff

responded that it would be exactly what is requested in the suit plus costs. Mr. Konfederat agreed to the amount and terms and stated that his attorney would forward settlement papers by overnight mail. When Plaintiff received such papers on July 19, 2013 (Appendix A), they turned out to simply be a general release. A release signed only by Plaintiff and not by Defendants. Plaintiff sent several phone text messages to Mr. Konfederat explaining that this must be agreed to by both parties and setting out what changes would need to be made, however no response was received from Mr. Konfederat from this point on. It now appears to Plaintiff that this settlement overture was merely an attempt to deceive Plaintiff into believing that this was a mutual and enforceable agreement.

4. Second Motion to Deem Admitted and Motion for Relief for Corporate Party's Failure to Attend Deposition and Costs

On July 30, Defendant failed to attend deposition or make any attempt to suggest other arrangements, causing Plaintiff out-of-pocket costs, and so on August 2, 2013 Plaintiff filed his Motion for Relief. (CP p. 43) Further, by August 2, 2013 Plaintiff had not received any response to his Request for Admissions, and so filed

his Second Motion to Deem Admitted (CP p. 20) under CR36, as directed by the trial court.

On August 24, 2013 Plaintiff received in the mail the trial court's Order on Second Motion to Deem Admitted and to Strike Defenses (CP p. 46). In it the Court acknowledges the frustration that Plaintiff must have owing to the unresponsiveness of Defendant, but then acknowledges as well the frustration Defendants must have. (Second Motion to Deem Admitted and to Strike Defenses, ¶ 1, CP p. 46) For Defendant's willful neglect and flouting the will of a court of a sister state and to defraud of one of its citizens, the trial court gave equal weight to their sorrows. The trial court then states in the Order: "*On two prior occasions, this Court has hinted rather broadly that if the defendant properly brought a motion to dismiss for lack of personal jurisdiction, this would very likely be viewed favorably.*" (Second Motion to Deem Admitted and to Strike Defenses, ¶ 2, CP p. 46) The trial court had actually given Defendants three opportunities to respond (the first being denial of Plaintiff's Motion for Default), each of which was completely ignored by Defendants. And in this latest Order the trial court gave Defendant yet another 30 days to file a motion to

dismiss (Second Motion to Deem Admitted and to Strike Defenses, ¶ 4, CP p. 47), making very clear that it would be granted, to the unfair disadvantage of Plaintiff's rightful claim.

5. Defendant's Appearance and Motion to Dismiss

In response to the trial court's multiple suggestions, Defendant finally hired Washington counsel who then filed a Notice of Appearance and a Motion to Dismiss for Lack of Personal Jurisdiction on August 28, 2013. (CP p. 48 & p. 51) Such Motion cites everything from the Fourteenth Amendment to several cases which have little or no true bearing on the issue at hand. In one passage, counsel states, "*The transaction at issue is Defendant's one-time listing of the Vehicle for sale via an unrestricted general e-Bay Internet auction.*" (Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶ 1.2, CP p. 54) As it would turn out, e-Bay is the primary and perhaps sole channel through which Defendant moves vehicles, as will be shown.

Plaintiff responded to Defendant's Motion to Dismiss on September 23, 2013, with his Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. (CP p. 67) In it Plaintiff

notes Defendant's intransigence through most of the course of this action, and their refusal to acknowledge the trial court until the Court made absolutely clear that it would favor their position if put forth. (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶¶ 1.2 – 1.3, CP p. 67) Given Defendant's unresponsiveness, Plaintiff requested of the trial court that Defendant's Motion be viewed skeptically. (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶¶ 1.5, CP p. 68)

Plaintiff then in his Opposition went on to address the substantive issues at hand, first that Defendant's Motion was untimely. Plaintiff described CR 12 and the circumstances under which certain defenses are waived, including lack of personal jurisdiction (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶¶ 2.1, CP p. 68), which applies to the instant case. Plaintiff described why *Boschetto v. Hansing* is incompatible with the application made by the defense, and how *Boschetto* actually supports Plaintiff's position. (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶¶ 2.2, CP p. 69)

Plaintiff noted in this sworn Opposition that , in contrast with Defendant's claim that this was a "one-time listing" on the auction site e-Bay, Plaintiff found that the identity he had purchased the vehicle from, "carmaxbrokers", had 390 "feedbacks" from e-Bay users who had purchased items from "carmaxbrokers", and further that as of the date of the Opposition filing there were 413 "feedbacks", every one of which seen by Plaintiff were written by purchasers who had bought a vehicle from "carmaxbrokers" on e-Bay. This may be independently confirmed by checking the profile of "carmaxbrokers" on e-Bay. Therefore, Plaintiff demonstrated in his Opposition that, "Defendant is primarily, if not exclusively, an internet seller". (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶ 2.2, CP p. 67)

Plaintiff went on to note that this "CarMax Brokers" bears no affiliation with the nationwide franchise "CarMax", and so it appears that this is an attempt by Defendant to use the good reputation of the national franchise to their advantage. Whereas the nationwide franchise does have car lots for local sale, Plaintiff was specifically told by Mr. Konfederat that their only facility is "a warehouse in New York". (Opposition to Defendant's Motion to Dismiss for Lack of

Personal Jurisdiction, ¶ 2.2, CP p. 69)

By way of support for his position that the trial court does have personal jurisdiction, Plaintiff cited recent case law decided by the Washington Court of Appeals which deal with the exact legal issues of this cause, with facts that are very similar. These are Davis v. Opacki (Wash. Ct App Div 2 #41087-7-II, Sep 2012), and Brown v. Garrett (Wash. Ct App Div 1 #68095-1-I), and Plaintiff described in detail their relevance to the issue at hand. (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶ 2.4 – 2.5, CP p. ~~71-72~~⁷⁰⁻⁷¹) Further, Plaintiff cited Precision Laboratory Plastics v. Micro Test, Inc., 981 P.2d 454 (Wash. Ct. App. 1999) which *"finds that a passive website that merely makes information available likely would not support jurisdiction, whereas a website that involves the exchange of information may support jurisdiction, depending upon the 'level of interactivity and commercial nature of the exchange of information'."* (Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, ¶ 2.6, CP p. 71) So, classified ad, versus actual bid and purchase. And Plaintiff further cited other cases relevant to the 'long arm statute' and personal jurisdiction for the trial court.

This purchase and sale met the tests of the Washington 'long arm statute' as determined by recent case law. This is established first by whether e-Bay is just an *informational*, or an *interactive* site. As e-Bay allows more than just reading of information, and in fact it allows completing purchases, then it does meet that test. Second, Defendant does conduct most if not all of their sales on e-Bay, as demonstrated by their 'feedback' on that site and by Defendant's statement that otherwise they only operate a warehouse. And third, apparent fraud was committed. Plaintiff has diligently endeavored to prove these facts unequivocally but has had failure of discovery.

Counsel for Defendants responded with a Reply which simply claimed that Plaintiff's Opposition was not filed timely. (CP p. 64)

Plaintiff then filed a Response which pointed out that the opposing party to a motion to dismiss must receive 28 days' notice, and that when such notice is served by mail that 3 days must be added, under Court Rules. (Plaintiff's Response to Defendant's Reply in Support of Defendant's Motion to Dismiss, ¶ 2.1, CP p. 80) And that even not considering this, Plaintiff had received only 26 days notice, and if the day of the hearing is counted, 27 days,

either of which which is clearly insufficient under Court Rules. Plaintiff noted further that counsel for Defendant had not certified when or how she had served their Reply. (Plaintiff's Response to Defendant's Reply in Support of Defendant's Motion to Dismiss, ¶¶ 2.2 – 2.4, CP p. 85) And Plaintiff pointed out that if by some mathematical technique his Opposition had been filed a day or two late, that that would in no way prejudice Defendant's position. That Defendant's counsel is an experienced litigator, and yet obviously gave insufficient notice of the hearing.

On October 4, 2013 Plaintiff received in the mail the trial court's Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, which simply dismissed the case with prejudice. No exploration of the issues raised by Plaintiff were noted, nor legal justification made.

IV. CONCLUSION

The mechanism of the law is critical to its function, and when this is overridden or bypassed it undermines what it means to make contract, and confidence of the public in a predictable business environment.

This case is about not only the function of law and its relation to and effect on business transactions though, it is also about right and wrong. Is it right that a used car dealer is enabled to defraud and deny a resident of a sister state by virtue of location? If allowed, what effect will this have when it becomes known generally by used car dealers that they have effective immunity as long as they sell to citizens of other states? This transaction wasn't for a pack of gum or pencils. This was a significant purchase by Plaintiff, of a vehicle which proved significantly defective almost immediately after the sale, which can not be used for its intended purpose, proximately caused by the conduct of Defendants in intentionally obscuring material and significant defects.

Plaintiff respectfully requests that this honorable Court order the trial court to grant default judgment to Plaintiff. In the alternative, Plaintiff requests that this Court overturn the findings of

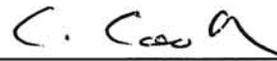
the trial court at each critical juncture, by reversing the case dismissal, and ordering the trial court to grant Plaintiff's Motion to Deem Admitted and Plaintiff's Motion for Relief.

VERIFICATION

I declare under penalty of perjury under the laws of the State of Washington that all statements in the foregoing Appellant's Brief are true and correct to the best of my knowledge.

A true and correct copy of this Motion has been forwarded this day to Defendants' counsel, Wendy E. Lyon, Riddell-Williams, 1001 4th Ave #4500, Seattle WA.

Dated: 3 February, 2014



C. Cook
14912 Northpark Ave N
Seattle, WA 98133

Appendix A

“Settlement Document”

GENERAL RELEASE

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, KNOW THAT:

WHEREAS: Mr. Carl Cook is an individual residing at 14912 N. Park Ave. N., Shoreline, WA 98133 (hereinafter the "RELEASOR");

WHEREAS: Advanced Auto Brokers, LLC, d/b/a CarMax Brokers is a New York Limited Liability Company located at 1166 Erie Blvd. West, Syracuse, NY 13204 (hereinafter the "RELEASEE");

WHEREAS: On or about March 19, 2012, the RELEASOR purchased from the RELEASEE a 2007 Grand Cherokee, Vin No.: 1J8GR48K07C645301, (hereinafter the "Vehicle"), which Vehicle was subsequently the subject of a lawsuit filed by the RELEASOR against the RELEASEE, on or about December 14, 2012, in the Superior Court of the State of Washington for King County, titled, C. Cook, Plaintiff, vs. Advanced Auto Brokers, LLC, dba Carmax Brokers, Defendant, No.: 12-2-39723-6 SEA; Hon. William L. Dowling (hereinafter the "Action");

WHEREAS: the RELEASOR and the RELEASEE have reached an agreement as follows:

1. The RELEASOR shall transfer the ownership and/or title for the Vehicle to the RELEASEE, and shall produce the Vehicle to the RELEASEE at a mutually agreeable time and place for transport of the Vehicle by the RELEASEE to a place of its choosing.

2. The RELEASOR shall prepare and file with the court a Stipulation of Discontinuance with Prejudice in the Action and promptly provide a filed copy of the same to the RELEASEE.

3. The RELEASOR and RELEASEE agree to mutually cooperate and communicate with one another with regard to completing the terms of this General Release.

4. In exchange for and consideration of the foregoing, the RELEASEE shall pay to the RELEASOR the sum of Ten Thousand Nine Hundred Dollars (\$10,900.00), which sum is currently being held in escrow by the attorneys for the RELEASEE.

5. In further consideration of the foregoing, the RELEASOR, upon receipt of all funds as set forth in this General Release from the RELEASEE, releases and discharges the RELEASEE, the RELEASEE'S heirs, executors, administrators, successors and assigns, officers, and employees from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR'S heirs, executors, administrators, successors and assigns ever had, now have or hereafter shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE. More particularly, from any and all claims that were brought or could have been brought for any and all known and unknown, foreseen and unforeseen damages arising out of the Action.

The words "RELEASOR" and "RELEASEE" include all releasors and all releasees under this RELEASE. This RELEASE may not be changed orally.

In Witness Whereof, the RELEASOR has hereunto set RELEASOR'S hand and seal on the _____ day of _____, 2013.

Carl Cook

State Of Washington)
County of King) ss.

On this _____ day of _____, 2013, before me, the undersigned, personally appeared Carl Cook, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public
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